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Children Seek Refuge from Gang-Forced Recruitment: How Asylum Law Can Protect the Defenseless

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CHILDREN SEEK REFUGE FROM GANG-FORCED RECRUITMENT: HOW ASYLUM LAW CAN PROTECT THE DEFENSELESS

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INTRODUCTION

Jorge Solomon-Membreno and Fatima Marlene Villanueva-Membreno are siblings who grew up in their grandmother's house in Sensuntepeque, El Salvador.[1] Sensuntepeque suffers from prolific gang violence at the hands of MS-13, a transnational gang that commits ongoing acts of assault, rape, and torture.[2] MS-13 is present in every part of El Salvador, and exercises control over innocent civilians with horrific acts of violence.[3] During his adolescence, Jorge was approached by members of MS-13 in an attempt to recruit him, but Jorge refused.[4] His sister Fatima, who was eleven years old at the time, endured a barrage of sexual harassment from MS-13 members, who at one point threatened to "get her."[5] On her way home from school, Fatima was seized and knocked unconscious.[6] When she

1. Solomon-Membreno v. Holder, 578 F. App'x 300, 302 (4th Cir. 2014).
2. *Id.*
3. *Id.* at 301.
4. *Id.* at 302.
5. *Id.*
6. *Id.*

regained consciousness, her chest was exposed, her clothes were ripped, and she felt an immense pain in her stomach.[7] Jorge confronted the gang members he believed to be responsible for Fatima's rape; they responded by beating Jorge until he ran to safety.[8] Jorge did not seek help because he thought the police would provide no assistance, as is common in El Salvador.[9] Jorge and Fatima sought refuge from the gang at their aunt's home in a nearby town.[10] After some time, they returned to their grandmother's home, but confined themselves inside to avoid encountering the gang again.[11]

Jorge fled El Salvador and entered the United States near Tecate, California.[12] There, the Department of Homeland Security served him with a Notice to Appear in removal proceedings.[13] Fatima stayed at her grandmother's house, but shortly followed in her brother's footsteps after discovering her grandmother's home had been set on fire.[14] Fatima entered the United States near Hidalgo, Texas, and was also served with a Notice to Appear in removal proceedings.[15] Jorge and Fatima applied for asylum to avoid being deported back to El Salvador, where they were sure MS-13 awaited their arrival.[16] After lengthy legal proceedings and a denial of their application, Jorge and Fatima appealed their case to the Fourth Circuit.[17] The Fourth Circuit affirmed the denial of their asylum application, concluding that Jorge and Fatima did not constitute "refugees" under the Immigration and Nationality Act (INA) because they did not satisfy the Act's definition of "a refugee."[18]

Section 1158(b)(1)(A) of the INA, which is the statute governing asylum claims, requires that an applicant establish that he or she is a refugee in order to obtain asylum in the United States.[19] In order to establish refugee status, an applicant must show that he or she is persecuted because of his or her race, national origin, political opinion, or membership in a particular social group with defined

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 303.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 303–04.
18. *See id.* at 306.
19. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A) (2012).

boundaries.[20] Fatima and Jorge sought to establish refugee status by asserting that they were being persecuted by gang members on account of their membership in a particular social group.[21] The Fourth Circuit denied their application because their proposed group lacked boundaries.[22] Without asylum, Fatima and Jorge would have to return to the very nightmare they sought to escape.

Jorge's and Fatima's experience with gangs in El Salvador and in the United States court system is not unique.[23] Their story is a prime example of the very issue circuit courts are confronted with by the recent influx of immigrants from Honduras, El Salvador, and Guatemala.[24] Many Circuits have attempted to resolve the issue of whether the "membership in a particular social group" category of "refugee" includes children who flee gang violence in inner cities.[25] Courts of Appeals have reached different conclusions about whether the provision covers situations like those faced by Jorge and Fatima.[26] This division has led to a lack of uniformity in the application of Section 1158(b)(1)(A), and individuals with almost identical cases can receive contradictory judgments.[27]

Part I of this Note discusses the history of gang violence and government corruption in Honduras, El Salvador, and Guatemala. Additionally, Part I explains the basic asylum process under Section 1158(b)(1)(A), which every individual must navigate to be granted asylum. Part II of this Note examines the requirements the Board of

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20. *Id.* § 1158(b)(1)(B)(i).

21. Jorge claimed that he belonged to a "social group of young Salvadoran students who expressly oppose gang practices and values and wish to protect their family against such practices." *Solomon-Membreno*, 578 F. App'x at 301. Fatima argued that she belonged to a "social group composed of young female students who are related to an individual who opposes gang practices and values." *Id.*

22. *Id.* at 306.

23. *See generally* Benjamin Mueller, *To Help Unaccompanied Minors, New York City Posts Representatives at Immigration Court*, N.Y. TIMES, Sept. 16, 2014, http://www.nytimes.com/2014/09/17/nyregion/to-help-unaccompanied-minors-city-posts-representatives-at-immigration-court.html.

24. *See* Haeyoun Park, *Children at the Border*, N.Y. TIMES, Oct. 21, 2014, http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html.

25. *See* discussion *infra* Part II.B.

26. *See* discussion *infra* Part II.B.

27. Mejia-Fuentes v. Attorney Gen. of U.S., 463 F. App'x 76, 80–81 (3d Cir. 2012) (granting the asylum-seeker's petition for review and remanding to the BIA); Rivera-Barrientos v. Holder, 666 F.3d 641, 650 (10th Cir. 2012) (finding the asylum-seeker's claim met two of the three requirements, but ultimately affirming the BIA's decision); Mendez-Barrera v. Holder, 602 F.3d 21, 27 (1st Cir. 2010) (denying the petition for review because the asylum-seeker's claim only met one of the three requirements).

Immigration Appeals (BIA) has promulgated for defining a particular social group and the differing tests that circuit courts have used to determine if an individual meets those requirements. The BIA scrutinizes every purported particular social group with a three-part test,[28] but circuit courts have not unanimously accepted this test.[29] In addition, Part II explores the BIA and circuit court jurisprudence with respect to proposed particular social groups in the context of Central American gangs. Although most circuits have denied asylum to children fleeing gang violence in Central American cities, there are two circuits that have yet to take on the issue, and another circuit that stands with only one foot in the door of acceptance.[30]

Part III of this Note adopts the BIA's three-part test to analyze asylum applications of individuals seeking to establish a particular social group. Since the BIA has the authority to oversee the adjudication of asylum applications and the BIA has properly explained its reasoning for the three-part test, its standard deserves deference. However, this Note disagrees with the BIA with respect to whether children fleeing gang violence are entitled to asylum, by concluding that individuals between the ages of eleven and eighteen, who escape gang-forced recruitment, are deserving of asylum.[31]

I. THE CURRENT STATE OF AFFAIRS IN CENTRAL AMERICA AND IN THE U.S. ASYLUM PROCESS

A. The Government Corruption and Plague of Gang Violence in the Inner Cities of El Salvador, Honduras, and Guatemala

Horrific violence committed by growing gangs, such as MS-13, plagues El Salvador.[32] Gangs, whose membership numbers are more than 85,000, participate in kidnapping, extortion, and forced

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28. *See infra* Parts II.A.1, II.B.1; *see also In re* A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

29. *See* discussion *infra* Part II.A.4.

30. *See* discussion *infra* Part II.B.

31. This Note will put special emphasis on male children who suffer from forced recruitment. Because of the unique issues raised with females who are subjected to sexual violence, the topic of female children fleeing sexual-related forced recruitment is outside of the scope of this Note. However, this Note will attempt to analogize females and males for the general purpose of forced recruitment, but the issue of sexual violence in asylum law will be avoided.

32. This Note discusses the effect gangs have on El Salvador, Honduras, and Guatemala, but will reference MS-13 in particular because it is the good example of gang activity in those countries.

recruitment.[33] These groups in general, and MS-13 in particular, rely on forced recruitment to expand their memberships.[34] Male children often attempt to leave El Salvador because of a fear of assault or death for refusing to join gangs.[35] Additionally, gangs threaten to kill the families of the young boys they try to recruit,[36] and female children fear rape or kidnappings at the hands of gang members.[37]

El Salvador's citizens are at the whim of these gang activities because the judicial system and executive branch do not provide much assistance.[38] Unfortunately, this has led El Salvador to be ranked first in the world for femicide (female homicide) and lethal

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33. WILLIAM A. KANDEL ET AL., CONG. RESEARCH SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 8 (2014), *available at* http://fas.org/sgp/crs/homesec/R43628.pdf.

34. DIV. OF INT'L PROT., UNITED NATIONS HIGH COMM'R FOR REFUGEES (UNHCR), GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 2 (2010) [hereinafter UNHCR], *available at* http://www.refworld.org/docid/4bb21fa02.html.

35. WASH. OFFICE ON LATIN AM., CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 3 (2008), *available at* http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf.

36. *See, e.g.*, Michael Vincent, *Gang Violence in Central America Drives Victims to Make Risky Cross-Border Journey to New Life in US*, ABC NEWS (Oct. 23, 2014), http://www.abc.net.au/news/2014-10-24/gang-violence-central-americans-cross-usa-border/5815552. In an interview, a concerned mother explains that she and her family fled their country because boys are threatened with death or harm to their families if they refuse to join. *See id.*

37. WASH. OFFICE ON LATIN AM., *supra* note 35, at 3. Rape victims do not report the crime because of a fear of reprisal, ineffective and unsupportive responses from authorities, and the public perception of the unlikely chance of conviction. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, EL SALVADOR 2013 HUMAN RIGHTS REPORT 15 (2014), *available at* http://www.state.gov/documents/organization/220654.pdf. The fact that in 2013 there were 4826 sexual assault claims, but only 392 convictions supports the public's perception of the unlikelihood of sexual assault convictions. *Id.* at 15 (noting that rape laws are, in fact, ineffectively enforced).

38. Substantial corruption in the judicial system, which undermines the rule of law and deteriorates the public's respect for the judiciary, led to a criminal conviction rate of less than five percent. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *supra* note 37, at 7 (citing the role that gangs play in the promotion of impunity through their use of intimidation). Furthermore, the uncontested threats to, and killings of, police officers, witnesses, and victims, has led to a large impediment of criminal investigations. *Id.* After explaining the beating he received for refusing to join a gang, an unnamed immigrant child recognizes the dire situation in an interview by stating, "[t]he gangs have practically taken control of my country. You don't feel free there, it's too dangerous." Mila Koumpilova, *Unaccompanied Children's Cases Put Immigration System to the Test*, STAR TRIBUNE, Oct. 16, 2014, http://www.startribune.com/local/279515212.html.

violence in 2011.[39] The Salvadoran government's tolerance of violence against women has specifically contributed to the leading femicide rate.[40] Gangs take advantage of the government's apathy toward women and target them for prostitution and sex trafficking if they refuse to join the gang.[41] These gangs, however, often do not stop with physical harm and sexual assault, but choose to follow through with death threats.[42] In a nation crippled by violence and a judicial system that refuses to help, children are taking the risk of fleeing El Salvador by themselves, rather than staying at home.[43]

Likewise, Honduras suffers from severe violence at the hands of transnational gangs, who commit acts of murder, extortion, and kidnapping.[44] Honduras also maintains an atmosphere of corruption, intimidation, and weakness in its justice system, which is underfunded, poorly staffed, and highly ineffective.[45] Even the Honduran legislature has taken part in the corruption by suspending the attorney general and removing four magistrates from the Constitutional Chambers of the Supreme Court, contrary to its Constitution.[46] Criminal prosecutions in Honduras are crippled by a lack of witness protection, poor evidence brought by the prosecution, and widespread distrust of the legal system.[47] For women, the problem is particularly serious because violence against women continuously rises, and perpetrators too often are not convicted.[48]

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39. GENEVA DECLARATION ON ARMED VIOLENCE & DEV., *When the Victim Is a Woman*, *in* GLOBAL BURDEN OF ARMED VIOLENCE 113, 119 (2011), *available at* http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011_CH4.pdf.

40. *Id.* at 122.

41. UNHCR, *supra* note 34, at 4 (recognizing that gangs target "young women and adolescent girls" for "prostitution and trafficking purposes, or to become sexual property of gangs").

42. *Id.* at 3.

43. Ana Gonzalez-Barrera et al., *DHS: Violence, Poverty, is Driving Children to Flee Central America to U.S.*, PEW RES. CENTER (July 1, 2014), http://www.pewresearch.org/fact-tank/2014/07/01/dhs-violence-poverty-is-driving-children-to-flee-central-america-to-u-s/.

44. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, HONDURAS 2013 HUMAN RIGHTS REPORT 1 (2013), *available at* http://www.state.gov/documents/organization/220663.pdf.

45. *Id.* at 8. The Department of State explicitly pointed to the lack of internal controls as a reason for rendering the judicial system susceptible to bribery. *Id.*

46. *Id.* at 8-9. In appointing a new attorney general, the Honduran legislation did not abide by the constitutional process, which required certain selection procedures by the nominating committee. *Id.* at 9.

47. *Id.* (pointing to judicial corruption as another factor).

48. From the year 2005 to 2012, there has been a 246% increase in violent deaths of women. *Id.* at 17. Rape, in particular, permeates throughout its society, and is largely underreported due to a fear of retribution and continued violence. *Id.* Even

The excessive level of violence and the breakdown in the judicial system has given Honduras the top ranking for murder rate in the world in 2012.[49] The statistics become even more sobering when taking into account the fact that last year 1013 people under the age of twenty-three were murdered in Honduras, a nation of only eight million people.[50] These soaring murder rates are a major motivator for the children leaving Honduras.[51]

Guatemala, too, is crippled by corruption of its police officers and judicial officials.[52] The violence Guatemalan citizens endure comes from gangs and organized crimes, which is hard to measure given the corrupt and inadequate judicial system.[53] The Guatemalan police force itself contributes to the high levels of crime, and police impunity is rampant.[54] One of the many failures of the judicial system is the

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when the cases were reported, women have not been protected. *Id.* Between 2008 and 2010, 1010 cases of femicide were heard in court, yet only fifty-six sentences were handed out. GENEVA DECLARATION ON ARMED VIOLENCE & DEV., *supra* note 39, at 122.

49. Gonzalez-Barrera et al., *supra* note 43. To put this into perspective, in 2012 Honduras had a murder rate of 90.4 homicides per 100,000 inhabitants, and in the same year the United States had a murder rate of 4.7 homicides per 100,000 inhabitants. UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2013, at 128 (2014), *available at* http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf. Sadly, in 2013 the homicide rate in Honduras's industrialized city of San Pedro Sula stood at 187 homicides per 100,000 inhabitants. Gonzalez-Barrera et al., *supra* note 43. San Pedro Sula's gang violence problem has earned it the title of murder capital of the world. *Id.*

50. Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 9, 2014, http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html?_r=0. In her article, Robles describes a late-night visit to a San Pedro Sula morgue where sixty bodies, all victims of violence, were piled in a heap, and the technicians explained that they regularly receive corpses of children under ten, and sometimes as young as two. *Id.* She goes on to tell the story of an eleven-year old boy whose throat was slit for not paying a fifty-cent extortion fee. *Id.*

51. *See generally id.* Honduran cities make up more than half of the top fifty Central American cities of origin for immigrant children here in the United States. *Id.* However, almost no children come from Nicaragua, a neighboring country that suffers from extreme poverty, but does not share Honduras's gang problem. *Id.*

52. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, GUATEMALA 2013 HUMAN RIGHTS REPORT 1 (2014), *available at* http://www.state.gov/documents/organization/220657.pdf.

53. *Id.* at 1; HAL BRANDS, CRIME, VIOLENCE, AND THE CRISIS IN GUATEMALA: A CASE STUDY IN THE EROSION OF THE STATE 29 (2010), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB986.pdf ("[A]ll serious observers agree that criminal elements have been hugely successful in penetrating the security forces, judicial institutions, and practically every other office or agency charged with maintaining law and order.").

54. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, *supra* note 52, at 5. There were reports of police officers subjecting Guatemalan

lack of safety for those involved in the prosecutions.[55] Women who suffer from rape are helpless in seeking the prosecution of their assailants.[56] Sexual predators know this and perpetuate a level of sexual violence that brings Guatemala's femicide rate to extremely high levels.[57] The deterioration of Guatemala's law enforcement has given the gang population the opportunity to grow to roughly the same size as the Guatemalan army.[58]

Gangs in both Guatemala and Central America as a whole target children for forced recruitment because of the horrible economic conditions.[59] Youths who are poor, homeless, or from marginalized segments of society are of particular interest to gangs because they are more vulnerable to forced recruitment, violence, and other pressures.[60] The tactics used by gangs include threats of serious physical harm or death if they refuse to join the gang, threats to harm the victim's family, and threats of rape to female members of the resistor's family.[61] Even when children are not targeted for recruitment, they are nevertheless targets for violence. They are

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citizens to stops and proceeding to rape and steal from them (those police officers were not convicted). *Id.* at 6; *see also* BRANDS, *supra* note 53, at 35 (stating that only twenty-five percent of the population believe the police can be trusted and that seventy-three percent of urban and suburban residents believe the police are directly involved in crimes).

55. Judges, witnesses, and prosecutors are the recipients of threats and aggression. The United States Department of State stated that Guatemala's judicial system has failed due to inefficiency, insufficient personnel, and corruption. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, *supra* note 52, at 7.

56. The government does not effectively enforce its rape law. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, *supra* note 52, at 15 (citing the minimal training and capacity of the police to deal with rape). Through September 2013, there were 2156 reported cases of sexual or physical assault against women, yet only 141 of those led to convictions. *Id.* Femicide, which involves killings and sexual assault against women and children, had only a one percent to two percent conviction rate. *Id.* at 16.

57. GENEVA DECLARATION ON ARMED VIOLENCE & DEV., *supra* note 39, at 120. The sexual violence endured by women in Guatemala is related to organized crime and narco-trafficking. *Id.* at 114. Guatemala has a femicide rate of over 10 per 100,000 females in the population, which is five times greater than that of Western, Southern, and Northern European countries. *Id.* at 119–20.

58. BRANDS, *supra* note 53, at 23–24.

59. UNHCR, *supra* note 34, at 4 (recognizing that gangs respond with violence when met with rejection); *see also* BRANDS, *supra* note 53, at 25 (noting the various ways that gang involvement may be alluring to marginalized children); MICHAEL BOULTON, UNITED NATIONS HIGH COMM'R FOR REFUGEES, LIVING IN A WORLD OF VIOLENCE: AN INTRODUCTION TO THE GANG PHENOMENON 13 (2011) (stating that forced recruitment only affects significant numbers of children in Central America).

60. UNHCR, *supra* note 34, at 2, 4.

61. BOULTON, *supra* note 59, at 16.

often the victims of gang violence as a form of subjecting their family members to the gang's demands.[62] For these reasons, Guatemalan children also flee their home country and make perilous trips to foreign countries.[63]

B. The U.S. Asylum Process

The asylum process can be onerous and complex for any person seeking protection from the horrors back home. An individual seeking asylum in the United States may do so either through an affirmative asylum process or a defensive asylum process.[64] The affirmative asylum process requires that an asylum-seeker be in the United States and actively apply for asylum.[65] To begin the affirmative asylum process, an individual must apply for asylum with the United States Citizenship and Immigration Services (USCIS) within one year of his or her last arrival in the United States.[66] The individual will then receive an Appointment Notice to visit the nearest Application Support Center, where the individual will be fingerprinted and will receive background and security checks.[67] The asylum-seeker then receives notice of a scheduled interview with an asylum officer.[68] At the interview, an asylum-seeker is responsible for obtaining attorney representation, and if the individual does not speak English, he or she must obtain an interpreter.[69] The interview generally lasts an hour, where the merits of the asylum-seeker's application are scrutinized.[70]

The asylum officer makes his or her determination about the asylum-seeker's application based on meeting certain requirements.[71] The asylum-seeker must establish that he or she is eligible for asylum according to the INA, meets the definition of a refugee under Section

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62. *See* BRANDS, *supra* note 53, at 27–28 (quoting an interview with an MS-13 gang member, who admits to kidnapping a mother and child, dismembering them, and sending their body parts to the father in order to get him to pay the gang).

63. *Why Are so Many Children Trying to Cross the US Border?,* BBC NEWS (Sept. 30, 2014), http://www.bbc.com/news/world-us-canada-28203923.

64. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last updated Feb. 4, 2015).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

101(a)(42)(A), and is not barred by Section 208(b)(2) of the INA.[72] The asylum officer makes the decision after the interview, and the individual must return another day to hear the decision.[73] If the application is approved, the applicant is permitted to remain in the United States, and he or she may apply for lawful permanent residency and, ultimately, citizenship.[74]

Unfortunately, it is almost always the case that asylum applications from individuals fleeing Central America are not granted.[75] When the application is denied, the USCIS places the individual in removal proceedings and refers the application to an Executive Office for Immigration Review (EOIR) immigration court for a hearing, where an immigration judge reviews the claim de novo.[76] At this point, the defensive asylum process begins.[77]

The defensive asylum process can be used by aliens who are in removal proceedings for one of two reasons: either their application was denied by an asylum officer and they were referred to an immigration court by the USCIS, or they were arrested by the Department of Homeland Security at the United States-Mexico border or within the Unites States.[78] At a defensive asylum hearing in

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72. *Id.* Section 101(a)(42)(A) will be discussed further below. Section 208(b)(2) covers exceptions to granting asylum based on an individual's past criminal activity. INA § 208(b)(2), 8 U.S.C. § 1158(b)(2) (2012). This Note seeks to argue in favor of granting asylum for children who are fleeing gang violence and criminal activity rather than argue in favor of granting asylum for children who have committed such acts, and therefore Section 208(b)(2) is negligible for purposes of this Note.

73. *Affirmative Asylum Process*, *supra* 64. Importantly, asylum does not guarantee permanent residence in the United States. 8 U.S.C. § 1158(c)(2) (2012). There are a variety of reasons for asylum to be terminated, including a change in circumstances in his or her country of origin. *Id.* § 1158(c)(2)(A).

74. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF, CONVENTION AGAINST TORTURE PROTECTIONS (2009), *available at* http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf.

75. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, ASYLUM STATISTICS FY 2009–2013, at 31–32 (2014), *available at* http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf. In 2013, the Executive Office for Immigration Review received a total of 9898 asylum applications from individuals who had fled Guatemala, Honduras, and El Salvador. *Id.* Of the 9898 applications, the Executive Office for Immigration Review granted only 426, or 4.3%. *See id.*

76. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 74, at 3.

77. *Obtaining Asylum in the United States,* U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last viewed May 15, 2015).

78. *Id.* Though there are many ways to enter the United States, migrants from Guatemala, El Salvador, and Honduras enter the United States through the Mexican

the immigration court, immigration judges hear asylum cases in an adversarial fashion.[79] The applicant (and, if represented, his or her attorney), argues against the United States, which is represented by an attorney from Immigration and Customs Enforcement (ICE).[80] The immigration judge then determines whether the applicant is eligible for asylum, and, if so, grants asylum.[81] If, however, the immigration judge denies the applicant's request, the immigration judge will inquire as to whether any other forms of relief from removal are available to the applicant.[82] If none are available, the immigration judge will order that the alien be removed from the United States.[83] The applicant is subsequently removed from the United States within ninety days of when the removal order becomes administratively final.[84] The applicant will be deported to the country where the individual boarded the vessel or aircraft to come to the United States.[85] Both parties (the United States and the applicant) may appeal the immigration judge's decision to the BIA.[86] If the asylum-seeker contests the BIA's determination, he or she may appeal to the federal circuit court of appeals that has jurisdiction over the claim.[87]

The disagreement between the United States and an asylum-seeker in the defensive asylum process is whether the applicant is eligible for asylum based on the facts presented at the interview with the asylum officer.[88] An applicant must establish that he or she satisfies the definition of a refugee to be eligible for asylum.[89] Only aliens who are physically present in the United States may apply for asylum.[90] To be granted asylum, an applicant bears the burden of establishing that he

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border and endure an extremely perilous journey. Paulina Villegas & Randal C. Archibold, *Mexico Makes Route Tougher for Migrants*, N.Y. TIMES, Sept. 21, 2014, http://www.nytimes.com/2014/09/22/world/americas/mexico-makes-route-tougher-for-migrants.html?_r=0.

79. *See The Affirmative Asylum Process*, *supra* note 64.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. 8 U.S.C. § 1231(a)(1)(A)–(B)(i) (2012).

85. *Id.* § 1231(b)(1)(A).

86. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 74, at 4.

87. *Id.*

88. *See The Affirmative Asylum Process*, *supra* note 64.

89. 8 U.S.C. § 1158(b)(1)(A) (2012).

90. *Id.* § 1158(a)(1).

or she is a refugee.[91] As highlighted above, to establish refugee status an applicant must show that he or she is outside the country of his or her nationality, and that he or she "is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[92]

In essence, according to Section 1101(a)(42), an asylum-seeker must prove three elements to establish refugee status: (1) that the alien has suffered past persecution or maintains a well-founded fear of persecution; (2) that one of the five enumerated categories[93] is a central reason for the persecution; and (3) that the persecution is perpetuated by an organization that the government is unable or unwilling to control.[94] The second element is a particularly controversial area in asylum law, where the circuit courts have disagreed on whether children fleeing from gangs in Central America satisfies one of the five enumerated categories (namely, membership in a particular group).[95] The BIA created a test to determine whether individuals should be granted asylum, which has evolved over the years but has not been uniformly accepted.[96]

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91. *Id.* § 1158(b)(1)(B)(i). There are many exceptions in the INA for obtaining asylum. *See id.* § 1158(b)(2)(A). However, this Note will not discuss these exceptions, as they do not pertain to the issue this Note attempts to resolve.

92. 8 U.S.C. § 1101(a)(42) (2012). There are other ways to establish refugee status. However, this Note will not discuss them because they do not pertain to the issue at hand. Additionally, the requirement that the alien prove that he or she is outside his or her country will always be established for asylum purposes because asylum may only be granted when the alien is physically in the United States. *See* 8 U.S.C. § 1158(a)(1). Therefore, an important distinction is that an alien may be a refugee without having the protection of asylum because refugee status requires only being outside of his or her country of nationality. *See* 8 U.S.C. § 1101(a)(42).

93. The five enumerated categories are race, religion, nationality, membership in a particular social group, or political opinion. *Id.* § 1101(a)(42).

94. Y.V.Z. v. Attorney Gen. of the U.S., 492 F. App'x 291, 292–93 (3d Cir. 2012).

95. *See* discussion *infra* Part II.B.

96. *See* discussion *infra* Part II.A.

II. CONFLICTING VIEWS ON THE PROPER ASYLUM TEST

A. The Evolution of the Definition of "Membership in a Particular Social Group"

1. The Board of Immigration Appeals Takes the First Step: Acosta

To reiterate, an asylum-seeker must establish that he or she suffered past persecution or has a well-founded fear of future persecution on account of any one of the five enumerated categories in order to be granted asylum.[97] This Note will focus on the category of "membership in a particular group."[98] The BIA uses a three-step analysis when reviewing applications for asylum based on "membership in a particular group." The first requirement was created in the seminal case *In re Acosta*.[99] In *In re Acosta*, the respondent, a thirty-six-year-old man from El Salvador, entered the United States without inspection and stood to be removed.[100] The respondent applied for asylum, but the immigration judge denied his application.[101] On appeal, the BIA considered his application for asylum, and, in doing so, articulated the first requirement for asylum applicants seeking to establish refugee status under the INA via "membership in a particular social group."[102]

Before relocating to the United States, the respondent in *In re Acosta* formed a taxi company with fellow drivers to be operated in San Salvador, El Salvador.[103] The founders, including the respondent, managed the company and continued to drive their taxis.[104] The taxi company began to receive anonymous phone calls and notes believed to be from anti-government guerillas requesting that the taxi company cease its services.[105] After refusing to comply with the requests, the individuals working for the taxi company began to receive threats of retaliation, which were later carried out.[106]

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97. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 229–30 (B.I.A. 2014).

98. 8 U.S.C. § 1101(a)(42). Membership in a particular group has generated much jurisprudence and inconsistency given the variety of definitions purported by asylum-seekers. *See In re M-E-V-G-*, 26 I. & N. Dec. at 231.

99. *In re* Acosta, 19 I. & N. Dec. 211, 211 (B.I.A. 1985) (overruled in part by *In re* Mogharrabi, 19 I. & N. Dec. 439, 439 (B.I.A. 1987)).

100. *Id.* at 213.

101. *Id.*

102. *Id.*

103. *Id.* at 216.

104. *Id.*

105. *Id.*

106. *Id.*

Eventually, the respondent began to receive threats at his home, and was later attacked in his taxicab.[107] After the attack, the respondent fled El Salvador because he feared for his life and traveled to the United States, where he applied for asylum.[108]

The BIA evaluated the validity of the respondent's claim of "membership in a particular social group," which he framed as taxi drivers from the respondent's company and persons engaged in the transportation industry of El Salvador.[109] Given the sparse evidence of congressional intent as to the meaning of "membership in a particular social group," the BIA used its tools of statutory construction.[110] The BIA applied the doctrine of ejusdem generis and determined that the other four categories described persecution aimed at an immutable characteristic.[111] The BIA defined an "immutable characteristic" as "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[112] Thus, persecution on account of membership in a particular social group requires a showing of persecution directed toward an individual whom is a member of a group that shares a common, immutable characteristic.[113] The BIA explained:

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[114]

Applying this newly established definition for a particular social group, the BIA found that the respondent did not belong to a particular social group because taxi drivers could change professions, and therefore the purported group did not possess an immutable

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107. *Id.* at 217.
108. *Id.* at 213.
109. *Id.* at 232. COTAXI is the name of the taxi company that the respondent co-founded. *Id.* at 216.
110. *Id.* at 232–33.
111. *Id.* at 233.
112. *Id.*
113. *Id.*
114. *Id.*

characteristic.[115] The common, immutable characteristic requirement would henceforth be applied to every particular social group that was proposed at asylum hearings because of the BIA's precedential authority.[116] Eventually, this requirement would be examined by the Supreme Court of the United States and become established as a bedrock principle in asylum law.[117]

2. The Supreme Court Defers to the BIA

In *INS v. Aguirre-Aguirre*,[118] the Supreme Court of the United States explicitly held that the BIA should be given the appropriate deference in its interpretation of the INA.[119] The respondent in *Aguirre-Aguirre* was a Guatemalan native who had participated in various crimes in his home country.[120] The BIA interpreted the INA and determined that the respondent was removable because the INA barred him from the relief he sought.[121] The respondent appealed to the Ninth Circuit, and the circuit court determined that the BIA had incorrectly interpreted the INA.[122] The Supreme Court then granted certiorari to determine whether the Ninth Circuit correctly interpreted the INA and took this opportunity to solidify the level of deference attributed to the BIA when interpreting the INA.[123]

The Supreme Court began its analysis in *Aguirre-Aguirre* by plainly stating that the BIA was entitled to *Chevron* deference[124]

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115. *Id.* at 234.

116. *See Precedent Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/laws/precedent-decisions (last updated Sept. 10, 2013).

117. *See* discussion *infra* Part II.A.2.

118. 526 U.S. 415 (1999).

119. *Id.* at 424–25 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). The applicant in this case was seeking to withhold the removal proceedings, which is similar to seeking asylum, albeit a more difficult burden of proof. However, the case stands for a broader, and more relevant, proposition, namely that the BIA is entitled to deference for its interpretation of the INA's provisions. *Id.* at 425.

120. *Id.* at 418. Specifically, the petitioner set fires to buses, assaulted passengers, and vandalized shops. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 424.

124. *Chevron* deference dictates that whenever a court reviews an agency's interpretation of a statute, the court must answer two questions. *Chevron*, 467 U.S. at 842. The court must first determine whether Congress has spoken on the precise issue at hand. *Id.* If Congress has clearly stated its intent, the court and agency must give effect to that intent. *Id.* at 842–43. If Congress has not spoken on the precise issue, the court may not put forth its own interpretation of the statute but rather must proceed to the next question. *Id.* Next, the court must determine if the agency's

because the Ninth Circuit was confronted with issues that implicated the BIA's construction of the INA.[125] The Court pointed to explicit language in the INA, which charged the Attorney General with the administration and enforcement of the Act.[126] It then explained that Section 1253(h) of the INA granted decision-making authority to the Attorney General.[127] Lastly, the Court noted that the Attorney General had vested the BIA with "the discretion and authority conferred upon the Attorney General by law" in "considering and determining cases before it."[128] *Aguirre-Aguirre* set the path for circuit courts to defer to the BIA's determination, and, subsequently, the BIA has been cited approvingly by the circuit courts for its decision in *In re Acosta*.[129]

The Supreme Court has not given its own interpretation of Section 1158; rather, the Court stated that the provision should gain its meaning through a process of case-by-case adjudication.[130] Thus, circuit courts apply the BIA's standards to every asylum application in their individual discretion, which consequently promotes confusion and inconsistency in the application of Section 1158.[131] A main force behind this inconsistency is the fact that circuit courts review the issue of whether an applicant is a member of a particular social group under the INA de novo, while giving *Chevron* deference to the BIA's interpretation of the statute.[132] Specifically, the circuit courts have departed from the BIA's last two prongs in its three-step test.[133]

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interpretation is a permissible construction of the statute. *Id.* at 843. Essentially, the court will be prohibited from substituting its own construction of a statute so long as the agency has made a reasonable interpretation. *Id.* at 844.

125. *Aguirre-Aguirre*, 526 U.S. at 424.

126. *Id.* (citing 8 U.S.C. § 1103(a)(1) (1994)).

127. *Id.*

128. *Id.* at 425 (quoting 8 C.F.R. § 3.1(d)(1) (1998)).

129. *See, e.g.,* Niang v. Gonzales, 422 F.3d 1187, 1196, 1198–99 (10th Cir. 2005) (deferring to the BIA's interpretation of membership in a particular social group in *Acosta* and citing to *Aguirre-Aguirre*); Silva v. Ashcroft, 394 F.3d 1, 5 (1st Cir. 2005) (giving *Chevron* deference according to *Aguirre-Aguirre*, and applying the BIA's definition of membership in a particular social group in *Acosta*).

130. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

131. *See* Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2005) ("The courts are struggling to set the parameters for the definition of a 'particular social group' in light of *Acosta*. The circuit courts are not in agreement on a test.").

132. *See, e.g.*, Chavez v. U.S. Attorney Gen., 571 F. App'x 861, 863–64 (11th Cir. 2014) (holding that the BIA's legal determinations are reviewed de novo, but are given *Chevron* deference); Karki v. Holder, 715 F.3d 792, 800 (10th Cir. 2013) (holding that the BIA's decisions on purely legal questions are reviewed de novo); Cece v. Holder, 733 F.3d 662, 668 (7th Cir. 2013) (giving *Chevron* deference to statutory interpretation, but holding that whether a group constitutes a particular social group is a question of law that is reviewed de novo); Castaneda-Castillo v.

3. The BIA's Social Distinction and Particularity Requirements

After *In re Acosta*, the BIA named two separate requirements that must be met in order for an asylum applicant to establish "membership in a particular social group"—"social distinction" and "particularity."[134] The first of these two requirements is "social distinction," articulated in *In Re C-A-*.[135] *In Re C-A-* revolved around the respondent, a Colombian baker, who had fled his country because he feared persecution by the Cali drug cartel.[136] The respondent applied for asylum based upon his "membership in a particular social group," namely, noncriminal informants who had informed against the cartel.[137] In denying his application for asylum, the BIA focused on whether the purported group was socially distinct.[138]

"Social distinction" is found when the group is recognized as such by others in society.[139] For example, social groups based on an innate characteristic such as sex are recognizable social groups in society.[140] When determining whether the "social distinction" requirement is met, the relevant factor is the extent to which members of the community *perceive* those with the common, immutable

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Holder, 638 F.3d 354, 363 (1st Cir. 2011) (explaining that the ordinary remand rule applies to issues not yet decided by the BIA, but de novo review is appropriate to the BIA's decisions on the issue of a particular social group definition because it is a "pure issue of law"); Crespin-Valladares v. Holder, 632 F.3d 117, 124 (4th Cir. 2011) (holding that the BIA's legal conclusions are reviewed de novo and receive substantial, but not unlimited, deference); Ayala v. Holder, 640 F.3d 1095, 1096–97 (9th Cir. 2011) (holding that whether a group constitutes a particular social group under the Immigration and Nationality Act is reviewed de novo); Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 590 (3d Cir. 2011) (stating that questions of law are reviewed de novo, and the BIA's statutory interpretations receive *Chevron* deference); Malonga v. Mukasey, 546 F.3d 546, 553 (8th Cir. 2008) (elucidating that defining a particular social group presents a question of law, which is reviewed de novo, but according substantial deference to the BIA's statutory interpretations).

133. *See* discussion *infra* Part II.A.4.

134. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 232 (B.I.A. 2014).

135. 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006). *In Re C-A-* uses the term social "visibility," but the most recent BIA case on the matter renamed the term socially "distinct" as a way of clarifying the requirement. *In re M-E-V-G-*, 26 I. & N. Dec. at 236. Although case law uses the old term "socially visible," this Note will refer to the requirement by its new name, "social distinction," for the same purpose the BIA chose to rename the term: clarity.

136. *In re C-A-*, 23 I. & N. Dec. at 952–53.

137. *Id.* at 953.

138. *Id.* at 959–61.

139. *Id.* at 959.

140. *Id.*

characteristic in question as members of a social group.[141] In *In Re C-A-*, the BIA held that social distinction is limited to informants who are discovered because they appeared as witnesses, and since the respondent had not participated as a witness, he was no different than anyone else who crosses the cartel's path.[142]

The second requirement that must be satisfied to establish persecution on account of membership in a particular social group is particularity.[143] The BIA, in the landmark case *In Re A-M-E- & J-G-U-*, explained that a social group must be defined with particularity so as not to be amorphous.[144] In that case, the respondents were a married couple from Guatemala who came to the United States for economic opportunity and to be with their family.[145] The couple applied for asylum when faced with removal proceedings, arguing that they would be threatened and harassed by organized political gangs if they were to return.[146] They attempted to establish refugee status by demonstrating that they were members of a particular social group, namely, affluent Guatemalans.[147] In holding that "affluent Guatemalans" do not satisfy the "particularity" requirement, the BIA clarified that this requirement is meant to avoid definitions which are indeterminate, thereby preventing the population of the social group from varying.[148] Furthermore, the BIA asserted that the characteristic describing the social group may not be too subjective or inchoate.[149] Essentially, when determining if the proposed description is sufficiently particular, an individual should ask if the definition is "too amorphous to provide an adequate benchmark for determining group membership."[150] These two new requirements, "social distinction" and "particularity," were added to the common, immutable characteristic test, and applied to asylum cases by the BIA.[151]

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141. *Id.* at 957 (emphasis added).
142. *Id.* at 960.
143. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).
144. 24 I. & N. Dec. 69, 76 (B.I.A. 2007).
145. *Id.* at 70.
146. *Id.*
147. *Id.* at 73.
148. *Id.* at 76. The BIA denied a social group based on affluent Guatemalans because of the possibility the group's numbers could vary from one percent to twenty percent of the country's population. *Id.*
149. *Id.*
150. *Id.*
151. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 232 (B.I.A. 2014).

However, circuit courts did not unanimously accept these two new requirements.[152]

4. The Circuit Courts Disagree on the Appropriate Deference Level

The evolution of the BIA's analysis of asylum applications caused the circuit courts to begin to diverge from one another.[153] While the common, immutable characteristic test remained solidified by the Supreme Court of the United States,[154] the introduction of two new requirements caused some circuit courts to question the appropriate deference level for these new prongs.[155] A majority of the circuit courts, however, extended deference to the entire three-step test using the Supreme Court's reasoning in *Aguirre-Aguirre*.[156]

a. The First Circuit Upholds the BIA's Test

In *Mayorga-Vidal v. Holder*,[157] the First Circuit made clear that it would afford deference to the BIA's requirements of "membership in a particular social group."[158] Mayorga–Vidal, who was approximately fourteen or fifteen years old, encountered MS-13 members.[159] These gang members attempted to recruit him on multiple occasions.[160] When Mayorga-Vidal would refuse, the gang members responded with threats of violence.[161] Five months after gang members, who were trying to recruit him, threatened to end his life, Mayorga-Vidal fled to the United States and sought asylum.[162]

The social group definition in question was "young Salvadorian men who have resisted gang recruitment and whose parents are

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152. *See* discussion *infra* Part II.A.4.

153. *See* discussion *infra* Part II.A.4.

154. INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

155. *See, e.g.*, Cece v. Holder, 733 F.3d 662, 668 (7th Cir. 2013); Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 608 (3d Cir. 2011).

156. *See, e.g.*, Orellana-Monson v. Holder, 685 F.3d 511, 520–21 (5th Cir. 2012) (citing *Aguirre-Aguirre*, 526 U.S. at 424).

157. 675 F.3d 9 (1st Cir. 2012). The case was on appeal after the BIA dismissed the applicant's asylum claim. *Id.* at 13.

158. *Id.* at 14 ("The term 'particular social group,' 8 U.S.C. § 1101(a)(42)(A), is not defined by statute, and we accord deference to the BIA's interpretation of the bounds of this phrase.").

159. *Id.* at 12.

160. *Id.*

161. *Id.*

162. *Id.*

unavailable to protect them."[163] The court embraced the BIA's three-part test to determine the validity of the proposed social group.[164] Upon rejecting the asserted social group, the First Circuit reasoned that young men without familial support are not viewed as distinct within society.[165] The court argued that the familial support characteristic encourages a subjective interpretation, and in doing so fails to comply with the BIA's requirements.[166] The imposition of subjective interpretation and the want of boundaries, the court determined, made the purported group inconsistent with the particularity and social distinction requirements.[167] Other circuits have joined the First Circuit in embracing the BIA's three-part test for membership in a particular social group under the INA.[168]

b. The Fourth Circuit Applies the BIA's Three-Step Test

The Fourth Circuit, however, has reacted differently. Notably, this court uses the BIA's three-step framework.[169] It does not, however, explicitly embrace the "social distinction" requirement; rather, it found no need to question the requirement's validity under the INA because the asylum claims are dismissed for failure to meet the

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163. *Id.* at 11

164. *See id.* at 14 (accepting the common, immutable characteristic, social distinction, and particularity requirements); *see also* De Carvalho-Frois v. Holder, 667 F.3d 69, 73 (1st Cir. 2012); Mendez-Barrera v. Holder, 602 F.3d 21, 25 (1st Cir. 2010).

165. *Mayorga-Vidal*, 675 F.3d at 16. The court elaborated on its position, and explained that there can be many reasons for a young man in El Salvador to be without familial support. *Id.*

166. *Id.* at 17. Of particular concern was where a line would be drawn between youths that have familial protection and those who do not. *Id.*

167. *Id.* at 15.

168. *See* Chavez v. U.S. Attorney Gen., 571 F. App'x 861, 864 (11th Cir. 2014) (stating the court must defer to the BIA's interpretation in accordance with *Chevron*); Umaña-Ramos v. Holder, 724 F.3d 667, 671 (6th Cir. 2013) (giving deference to the BIA's requirements); Orellana-Monson v. Holder, 685 F.3d 511, 520–21 (5th Cir. 2012) (holding that the particularity and social distinction requirements are entitled to *Chevron* deference); Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012) (holding that the particularity and social distinction requirements are not arbitrary and capricious); Rivera-Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012) (accepting the BIA's requirements); Constanza v. Holder, 647 F.3d 749, 753 (8th Cir. 2011) (using the BIA's three-step test in its analysis); Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010) (requiring both social distinction and particularity to establish membership in a particular social group); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73-74 (2d Cir. 2007) (holding that the BIA's analysis was consistent with its precedent, and therefore entitled to *Chevron* deference).

169. Zelaya v. Holder, 668 F.3d 159, 165 (4th Cir. 2012) (citing Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009)) (stating the social distinction requirement is relevant).

particularity threshold.[170] Notwithstanding its use of the social distinction prong, the Fourth Circuit continues to avoid explicitly accepting or rejecting the requirement.[171] For example, in *Crespin-Valladares v. Holder*, the Fourth Circuit incorporates a footnote where it assures the reader that the validity of the "social distinction" requirement is not in question, and, therefore, it would not weigh in on the issue.[172] This tactic was repeated again in *Zelaya v. Holder*, where the court included another footnote, which reiterated that the court had not yet decided whether the requirement comported with the INA.[173] Recently, the Fourth Circuit removed all doubt that it would not determine whether the BIA was entitled to *Chevron* deference for its "social distinction" test by explicitly declining to make such a decision in the text of an opinion.[174]

c. The Ninth Circuit Provides Its Own Asylum Test

The Ninth Circuit has taken a different approach than the BIA and its sister circuits, including the First and the Fourth.[175] This court requires the asylum-seeker to establish "membership in a particular social group" on one of two grounds: (1) by putting forth a group that is united by a voluntary association,[176] or (2) by satisfying the BIA's three-pronged test.[177] The Ninth Circuit places a restriction on what seems to be an all-inclusive, two-optioned test. The purported group cannot be defined by a sweeping demographic division where its individual members manifest "a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings."[178] The court has held that a group is too broadly defined when it lacks a unifying relationship or characteristic which narrows the diverse and disconnected group.[179] Last, the Ninth Circuit's approach does not

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170. *Id.*

171. *Id.* at 169 (Floyd, J., concurring).

172. Crespin-Valladares v. Holder, 632 F.3d 117, 125 n.5 (4th Cir. 2011).

173. *Zelaya*, 668 F.3d at 165 n.4.

174. *See* Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014) ("While we have endorsed both the immutability and particularity criteria . . . we have explicitly declined to determine whether the social [distinction] criterion is a reasonable interpretation of the INA.") (citing *Zelaya*, 668 F.3d at 165 n.4).

175. *See generally* Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

176. This includes former associations as well.

177. *See* Perdomo v. Holder, 611 F.3d 662, 666 (9th Cir. 2010); *see also Hernandez-Montiel*, 225 F.3d at 1093.

178. *See Perdomo*, 611 F.3d at 668.

179. *Id.*

put a limit on how large the group may be, so long as it satisfies its test.[180] When using the BIA's test, the Ninth Circuit takes a broad view on what groups constitute a particular social group.[181] For example, the court has held that a group defined as females of a particular country can satisfy the BIA's requirements to be a particular social group.[182]

d. The Seventh Circuit Rejects "Social Distinction"

The Seventh Circuit has opposed the BIA's "social distinction" prerequisite.[183] The rejection of the "social distinction" requirement stems from the view that the requirement is inconsistent with prior BIA decisions, and does not necessarily follow from an interpretation of the INA.[184] The Seventh Circuit cites to cases where the BIA makes no mention of social distinction, yet finds an asserted group to constitute a particular social group.[185] Implicit in its holding is the idea that because the BIA is inconsistent with its use of the "social distinction" requirement, the BIA is not worthy of deference.[186] This analysis requires obedience to the principle that a circuit court cannot defer to an agency when the agency has been inconsistent, because it may lead to arbitrariness and usurp the agency's responsibilities.[187] Moreover, the Seventh Circuit has also rejected the "social distinction" precondition on the ground that it is nonsensical.[188] The

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180. *Id.* at 669. The court clarified that the size and breadth of a group cannot be the *sole* reason for denying asylum under the category of membership in a particular social group. *See id.* at 669 (emphasis added).

181. *See* Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005).

182. *See id.* The court boldly stated that in some circumstances females in general may constitute a particular social group as a logical application of asylum law. *See id.*; *see also Perdomo*, 611 F.3d at 667. The Ninth Circuit has also held that broad groups based on sexual orientation and sexual identity constitute a particular social group. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000); *see also* Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that all alien homosexuals are members of a particular social group).

183. *See* Cece v. Holder, 733 F.3d 662, 668 (7th Cir. 2013) (stating applicants do not need to show that they would be recognized as members of a social group); *see also* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

184. *See Gatimi*, 578 F.3d at 615–16.

185. *Id.*

186. *Id.* at 615. The court notes that it recognizes the Supreme Court has given *Chevron* deference to the BIA but states that with regard to the social distinction requirement the BIA has been inconsistent. *Id.*

187. *Id.* at 616 (citing AT&T Inc. v. FCC, 452 F.3d 830, 839 (D.C. Cir. 2006); Idaho Power Co. v. FERC, 312 F.3d 454, 461–62 (D.C. Cir. 2002) (rejecting an agency's interpretation because it is inconsistent and nonsensical)).

188. *Id.*

court explains that "social distinction" is something that is impossible to detect, and in some cases, individuals will go to great lengths to ensure they are not socially distinct.[189]

e. The Third Circuit Rejects the BIA's Additional Requirements

The Third Circuit, alternatively, rejects the BIA's additional qualifications and argues that neither the "particularity" nor the "social distinction" requirement is entitled to *Chevron* deference.[190] With respect to the "social distinction" requirement, the Third Circuit criticizes the BIA for not using the requirement in any of its prior cases where a purported group was held to constitute a particular social group.[191] The court has pointed out that certain characteristics have survived the common, immutable characteristic test, but are internal and cannot be known by others in society unless and until the individual makes the characteristic known.[192] For example, a homosexual individual's sexual orientation is an immutable characteristic, which is common among members of the homosexual community, but the presence of the characteristic would be unknown to society until a homosexual individual makes it known.[193] Thus, under this view, since the "social distinction" requirement is inconsistent with prior BIA decisions, it is an unreasonable addition to the BIA's test to establish refugee status vis-à-vis a particular social group.[194] This court mimics the Seventh Circuit's additional reason for rejecting the "social distinction" requirement,[195] under the theory that to apply the social distinction prong to individuals who go through great lengths to avoid persecution by blending into society would be nonsensical.[196]

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189. *Id.* Prime examples are the cases of women who belong to tribes that practice female genital mutilation. In those cases, women would undoubtedly conceal their opposition to those practices, and it is fair to say that they would refuse to acknowledge such a group's existence or that they belong to such a group, since the alternative would be to paint a target on themselves. *Id.* at 616.

190. *See* Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 608 (3d Cir. 2011).

191. *See id.* at 604.

192. *Id.* (arguing that these characteristics would not pass the social distinction test).

193. *See id.*

194. *Id.*; *see also* Y.V.Z. v. Attorney Gen. of U.S., 492 Fed. App'x 291, 295–96 (3d Cir. 2012).

195. The Third Circuit spent over a full page explaining in depth why the Seventh Circuit rejected social distinction. *See Valdiviezo-Galdamez*, 663 F.3d at 604–06.

196. *See id.* at 607.

The Third Circuit, however, adds a new position to the controversy by rejecting the "particularity" requirement as well.[197] Under the Third Circuit's approach, "particularity" is nothing more than a rewording of the "social distinction" qualification, and thus, the former is rejected for the same reasons as the latter.[198] Therefore, according to this court, the "particularity" requirement is also unreasonable because of the BIA's inconsistency in applying it to asserted social groups.[199] Ultimately, this leads to the conclusion that neither the "particularity" nor the "social distinction" requirement are entitled to *Chevron* deference.[200] The Third Circuit has further opined that the BIA cannot depart from its announced rule without giving a principled reason.[201] In doing so, the court has asserted, the agency acted arbitrarily, capriciously, or in an abuse of discretion.[202] Unfortunately, the trouble does not end here, as the circuit courts are not unanimous as to how a test, or lack thereof, applies to the many children fleeing their home countries because of the ubiquitous gang violence.

B. Membership in a Particular Social Group in the Context of Central American Gangs

1. The BIA Takes a Position on Gang Related Asylum Claims

Two years after announcing its three-part test in *In Re C-A-*,[203] the BIA had an opportunity to take a position on gang related asylum claims. In *In re S-E-G-*,[204] the BIA addressed the issue of children resisting gang recruitment for the first time.[205] The respondent, a nineteen-year-old woman with two sixteen-year-old brothers, lived in El Salvador.[206] MS-13, the dominant gang in their town, harassed, robbed, and beat the boys for refusing to join their gang.[207] MS-13 members then threatened to rape the female respondent if the boys

197. *Id.* at 608.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006).
204. 24 I. & N. Dec. 579 (B.I.A. 2008).
205. *See generally id.*
206. *Id.*
207. *Id.* at 580. Armed gang members also threatened the boys to join the gang or their bodies were to end up in a dumpster someday. *Id.*

did not join their gang.[208] News of a young boy who was shot and killed by the gang for refusing to join the gang further inspired fear in the siblings.[209] The respondent and her brothers never reported the incidents to the police for fear of retaliation and the belief that the police would not provide assistance.[210]

In U.S. removal proceedings, the respondents sought asylum based upon "membership in a particular social group," but the immigration judge ruled that the beatings and threats were based on the gang's desire to recruit new members, rather than to punish the respondents for their membership in a particular social group.[211] On appeal, the respondent attempted to convince the BIA that the siblings were in fact persecuted because they belonged to a particular social group, "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities."[212]

In denying the asylum application, the BIA scrutinized the respondents' definition of a particular social group vigorously, using both the "particularity" and "social distinction" requirements, and found that the definition failed to satisfy those conditions.[213] The BIA stated that the proposed definition did not satisfy the "particularity" requirement because the terms of the group were amorphous, and there was no evidence showing that gangs limited their efforts to male children who resist gang recruitment based on their personal, moral, or religious opposition to gang activity.[214] Another fatal issue for the respondents was the lack of evidence that gang members focused their efforts to punish individuals with the asserted characteristics.[215] Additionally, the BIA reasoned that the purported social group constituted a potentially large and diffuse segment of society, and that the gang's motivation for targeting and

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 581.

212. *Id.*

213. *Id.* at 584–88. Importantly, the BIA explained that claims for asylum based on age may be cognizable. *Id.* at 583–84. The BIA argued that although youth may change and an individual may no longer be considered young through the passage of time, youth may still be considered an immutable characteristic because it is out of the control of any individual. *Id.*

214. *Id.* at 585. The terms were considered amorphous because people's ideas of their meaning may vary. *Id.*

215. *Id.*

recruiting the boys could be completely different than the fact that they belonged to the group.[216]

In *In re S-E-G-*, the BIA determined that the respondents also failed to satisfy the "social distinction" requirement.[217] The BIA held that Salvadoran youths who have resisted gang recruitment are not socially distinct because there was little evidence that the community perceived them as a group, or that they experienced a higher incidence of crime than the rest of the population.[218] Since gangs are known to retaliate against anyone who would interfere with their criminal enterprise, the BIA found that male children who resist gang recruitment are in the same position as every other person who is a threat to the gang's interest, and therefore not socially distinct.[219] Thus, the BIA held that "young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons . . . do[] not qualify as a particular social group."[220]

The most recent adjudication on the topic of individuals fleeing Central America due to gang-forced recruitment tactics came in 2014 in *In re M-E-V-G-*.[221] Echoing its rationale in *In re S-E-G-*, the BIA denied the asylum application of a Honduran youth who, along with his family, was kidnapped and beaten by members of a gang while traveling. The gang then threatened to kill him if he refused to join them.[222] After the incident, the gang threw rocks and spears at him and shot at him, two to three times per week.[223] The BIA reasoned that despite certain segments of a population being more susceptible

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216. *Id.*

217. *Id.* at 588.

218. *Id.*

219. *Id.* "Notably, neither the *2004 Country Reports*, nor more recent reports, mention forced recruitment by gang members or persecution against individuals who resist the gang, and the respondents have not submitted evidence that persuades us that gangs commit violent acts for reasons other than gaining more influence and power, and recruiting young males to fill their ranks." *Id.* at 587–88.

220. *Id.* at 588. Shortly after *In re S-E-G-*, the BIA was confronted with a broad definition, persons resistant to gang membership, in *In re E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008), which was also rejected for not being socially distinct. *See id.* at 594–95. The BIA found that membership in a larger group of people who are resistant to gangs is of no concern to anyone in Honduras or the gangs. *Id.* at 595. While admitting that young, urban males in Honduras might well be suspected by others in the community to have been approached by gangs seeking their membership, and to have refused, the BIA held that a purely statistical showing is insufficient to establish existence of a social group. *Id.*

221. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 229–30 (B.I.A. 2014).

222. *Id.* at 228.

223. *Id.*

to a particular type of criminal activity than others, members of the community all suffer from a gang's criminal efforts to maintain its presence in the area.[224] Before concluding, however, the BIA cautioned that its precedents are not blanket rejections of asylum claims involving gangs.[225] Although children fleeing Honduras, El Salvador, and Guatemala have not been able to create a social group at the adjudicatory level, the circuit courts have not been unanimous in their rulings on the issue.[226] The First and Fourth Circuits, like the vast majority of the circuit courts, have supported the BIA in denying asylum claims of children fleeing Central American gang violence.[227]

2. The First and Fourth Circuits Agree and Deny Asylum

The First Circuit addressed the issue of children fleeing Central American gang violence in *Mendez-Barrera v. Holder*.[228] In *Mendez-Barrera*, Yulma, a native of El Salvador, was approached by gang members who attempted to recruit her and threatened sexual abuse if

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224. *Id.* at 250–51. The BIA explained that gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping and drug trafficking. *Id.* at 250.

225. *Id.* at 251.

226. Though most courts have expressed their views on the issue, there are some circuit courts that have avoided the issue by deferring to the BIA. In *Ucelo-Gomez v. Mukasey*, the Second Circuit joined the majority of circuits in granting *Chevron* deference to the BIA. 509 F.3d 70, 73 (2d Cir. 2007). However, the Second Circuit has quickly dismissed all appeals it received concerning children fleeing Central America because of gang recruitment tactics with a series of unpublished summary orders citing *Ucelo-Gomez*. *See, e.g.*, Oliva-Flores v. Holder, 477 F. App'x 774, 775–76 (2d Cir. 2012); Vasquez v. Holder, 343 F. App'x 681, 682–83 (2d Cir. 2009); Aguilar-Guerra v. Holder, 343 F. App'x 640, 641–42 (2d Cir. 2009); Lemus-Lemus v. Holder, 343 F. App'x 643, 644–45 (2d Cir. 2009). The Ninth Circuit has used a similar strategy. In *Barrios v. Holder*, the Ninth Circuit articulated that it would provide *Chevron* deference to the BIA with regard to its decision of whether individuals resisting gang recruitment constitute a particular social group. 581 F.3d 849, 854–55 (9th Cir. 2009). Once the court made clear that it would provide deference, it began to dismiss all asylum claims that had even a hint of the similar characteristics in a thick stream of memoranda. *See, e.g.*, Andrade-Quiroz v. Holder, 444 F. App'x 122, 123 (9th Cir. 2011); Orellana-Martinez v. Holder, 411 F. App'x 19, 20 (9th Cir. 2010); Mazariegos-Diaz v. Holder, 362 F. App'x 794, 795 (9th Cir. 2010); Garcia-Galvez v. Holder, 361 F. App'x 755, 756 (9th Cir. 2010); Cabrera-Rodriguez v. Holder, 351 F. App'x 204, 205 (9th Cir. 2009).

227. *See* discussion *infra* Part II.B.2.

228. 602 F.3d 21 (1st Cir. 2010). Though this case entails a female respondent, the First Circuit has used this case to deny asylum applications for men that are based on similar facts. *See, e.g.*, Mayorga-Vidal v. Holder, 675 F.3d 9, 15 (1st Cir. 2012); Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010). Therefore, for purposes of the First Circuit, the same analysis applies to both males and females. *See Mayorga-Vidal*, 675 F.3d at 15 ("[T]he same analysis applies . . . .").

she refused.[229] Gang members continued their harassment and attacked Yulma's brother to pressure her to join.[230] Then, gang members threw rocks at her house, which caused the roof to warp and buckle.[231] Yulma no longer felt safe and fled to the United States through Mexico.[232] The Department of Homeland Security initiated removal proceedings against her, where she applied for asylum.[233] Yulma argued that she was a refugee because she was a member of a particular social group, "young women recruited by gang members who resist such recruitment."[234] After appealing the immigration judge's denial, the BIA held that group invalid because it did not meet the "particularity" and "social distinction" requirements.[235]

On appeal, the First Circuit analyzed the validity of Yulma's purported social group.[236] The court focused on the "social distinction" requirement first and required Yulma to demonstrate that the group was recognized in the community as a cohesive group.[237] The First Circuit found that none of the characteristics of her group rendered its members socially distinct in El Salvador.[238] Moving next to the "particularity" requirement, Yulma's group was also found to be unsatisfactory.[239] According to the First Circuit, it is impossible to identify who is or is not a young woman recruited by gang members who resists such recruitment.[240] Of particular concern to the court was who would be considered young, what type of conduct constituted recruitment, and the degree to which an individual must resist such recruitment.[241] The characteristics were held to be ambiguous and subjective, which was fatal to Yulma's claim.[242] For these reasons, the First Circuit upheld the BIA's ruling.[243]

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229. Mendez-Barrera v. Holder, 602 F.3d 21, 23 (1st Cir. 2010).
230. *Id.* at 23–24.
231. *Id.* at 24.
232. *Id.* at 23–24.
233. *Id.* at 23.
234. *Id.* at 24.
235. *Id.*
236. *Id.* at 26–27.
237. *Id.* at 26.
238. *Id.*
239. *Id.* at 27.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 28.

The Fourth Circuit agrees with the First Circuit in believing that the "particularity" requirement is not satisfied for these types of purported social groups.[244] In *Solomon-Membreno v. Holder*, Jorge and his sister Fatima, the brave children discussed in the Introduction to this Note, left El Salvador because of constant fear of harassment, alleged rape, and beatings inflicted by MS-13.[245] In removal proceedings, Jorge argued that he belonged to the social group, "young Salvadoran students who expressly oppose gang practices and values and wish to protect their families against such practices."[246] In determining the outcome of the case, the Fourth Circuit focused on the "particularity" requirement.[247] In affirming the BIA's denial of asylum, the court explained that the proposed social group lacked particularity because it did not provide a means to determine what actions were sufficient to oppose MS-13.[248] Filing a police report, expressing anti-gang sentiment through the media, and participating in city-wide anti-gang protests could all be considered opposing gang practices, the court reasoned, but do not provide an adequate benchmark for determining group membership.[249] The vast majority of circuit courts have engaged in similar analyses and subsequently denied asylum to these children.[250]

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244. Solomon-Membreno v. Holder, 578 F. App'x 300, 306 (4th Cir. 2014).

245. *Id.* at 302.

246. *Id.* at 304.

247. *Id.* at 304. The Fourth Circuit seems to use the particularity prong as its main method of striking the asylum claims based on these facts. *See, e.g.,* Zelaya v. Holder, 668 F.3d 159, 166 (4th Cir. 2012). The court analogized opposing gangs to refusing to join a gang, and subsequently held that the characteristic is too amorphous for the same reasons. *See id.*

248. *Solomon-Membreno*, 578 F. App'x at 306.

249. *Id.* at 306.

250. *See, e.g.*, De Leon-Saj v. Holder, 583 F. App'x 429, 430 (5th Cir. 2014) (holding that such groups are overly-broad and do not distinguish between members and non-members); Umaña-Ramos v. Holder, 724 F.3d 667, 673–74 (6th Cir. 2013) (finding such groups do not meet the particularity and social distinction requirements); Orellana-Monson v. Holder, 685 F.3d 511, 521–22 (5th Cir. 2012) (holding that such groups lack particularity and social distinction); Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (finding that the asylum-seeker is not socially distinct from any other Salvadoran that experiences gang violence); Ortiz-Puentes v. Holder, 662 F.3d 481, 483 (8th Cir. 2011) (holding that a group defined as Guatemalans who refused to join a gang and were persecuted as a result does not meet the particularity and social distinction requirement); Turcios-Avila v. U.S. Attorney Gen., 362 F. App'x 37, 42 (11th Cir. 2010) (finding that young Honduran men who refuse to join gangs do not even pass the immutable characteristic analysis); Gomez-Benitez v. U.S. Attorney Gen., 295 F. App'x 324, 326 (11th Cir. 2008) (holding that "Honduran schoolboys who conscientiously refuse to join gangs" are not a socially distinct group and do not satisfy particularity because recognition of it

However, there are two circuit courts in like positions that have yet to express their opinions on the matter.[251]

3. The Third and Seventh Circuits Have Not Addressed the Issue

Unlike the First and Fourth Circuits, the Third and Seventh Circuits have not been decisive on the issue of children fleeing Central American gang violence. After rejecting the BIA's three-step test in *Valdiviezo-Galdamez*,[252] the Third Circuit was faced with a similar social group. In *Mejia-Fuentes v. Attorney General of the United States*,[253] Jose Osmin Mejia–Fuentes, a Salvadoran native, claimed that he had been persecuted by members of MS-13 and that he feared future persecution if he returned to El Salvador.[254] The respondent explained that he was persecuted by the gang because he refused to join after they attempted to recruit him.[255] Mejia-Fuentes applied for asylum and attempted to establish refugee status as a member of the particular social group, "young men who morally oppose gangs and lack family ties."[256] The BIA held that Mejia-Fuentes failed to demonstrate that his proposed social group had the necessary social distinction to be recognized as a particular social group.[257] The Third Circuit began its analysis by reaffirming its holding in *Valdiviezo-Galdamez*, that social distinction and particularity were not entitled to *Chevron* deference.[258]

The court then approached whether Jose's social group existed prior to persecution.[259] However, instead of taking the opportunity to explicitly and definitively rule on the matter post-*Valdiviezo-*

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would permit the particular social group category to be a "catch-all" for Honduran immigrants).

251. *See* discussion *infra* Part II.B.3.

252. Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 590 (3d Cir. 2011).

253. 463 F. App'x 76 (3d Cir. 2012).

254. *Id.* at 77.

255. *Id.*

256. *Id.* at 77–78.

257. *Id.* at 79.

258. *Id.* at 79–80 (citing Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582 (3d Cir. 2011)).

259. *Id.* at 80. In the Third Circuit's jurisprudence, an asylum applicant who seeks to establish refugee status via membership in a particular social group must demonstrate that the social group existed prior to the persecution. *See* Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003) ("[T]he 'particular social group' must have existed before the persecution began."). The purpose of this test is to show that the social group exists independently of the persecution suffered by the applicant. *See id.*

Galdamez II, the court quoted a footnote in *Valdiviezo-Galdamez I*, which stated:

> Before the [immigration judge], Galdamez identified the particular social group to which he belongs as "those who have been actively recruited by gangs but have refused to join because they oppose these gangs." In his brief, he identifies the group as "young Honduran men who have been actively recruited by gangs and who have been persecuted by these gangs for their refusal to accept membership." In discussing the group, we omit the fact of the group's later persecution from its definition to make clear that the group exists independently of its persecution.[260]

The Third Circuit then remanded the case to the BIA to decide if "young men who morally oppose gangs and lack family ties," constitutes a particular social group under the INA, and in accordance with *In re Acosta*.[261] By remanding without determining whether Jose's group constituted a particular social group, the court avoided this issue. However, the Third Circuit is not the only court that has yet to definitively weigh in on the controversy.

The Seventh Circuit also has yet to give its opinion on the issue of whether children fleeing gang violence are entitled to asylum. There are only three cases in its jurisprudence that touch upon the issue.[262] The court was faced with individuals seeking asylum in the United States because of a gang's criminal activity in *Cece v. Holder*[263] and *Benitez Ramos v. Holder*,[264] but neither case dealt with forced recruitment. In *Benetiz Ramos*, the Seventh Circuit reaffirmed its rejection of the "social distinction" requirement and vacated the BIA's denial of withholding removal to a former gang member who feared persecution if he returned to El Salvador.[265] In *Cece*, the court

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260. Valdiviezo-Galdamez v. Attorney Gen. of U.S., 502 F.3d 285, 290 n.3 (3d Cir. 2007) (citation omitted).

261. *Meja-Fuentes*, 463 F. App'x at 80–81.

262. *See* Cece v. Holder, 733 F.3d 662 (7th Cir. 2013); Bueso-Avila v. Holder, 663 F.3d 934, 935 (7th Cir. 2011); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009). Though *Bueso-Avila* involves a fifteen-year-old child fleeing gang violence, the case addresses the sufficiency of evidence, which is outside the scope of this Note. *See Bueso-Avila*, 663 F.3d at 938 ("The issue before us, then, is whether the evidentiary record 'compels the conclusion' that the gang targeted Bueso–Avila, at least in part, because of his religion or church group membership.").

263. 733 F.3d 662.

264. 589 F.3d 426.

265. *Id.* at 431–32 ("Ramos was a member of a specific, well-recognized, indeed notorious gang, the former members of which do not constitute a 'category . . . far too unspecific and amorphous to be called a social group.' It is neither unspecific nor amorphous.").

held that the asylum-seeker, Cece, established that she belonged to a cognizable social group, namely "young women who are targeted for prostitution by traffickers in Albania."[266] The traffickers mentioned in the definition were a local gang who forced women into prostitution rings.[267] Critical to its holding, the Seventh Circuit stated that because age, gender, nationality, and living situation are unalterable, those characteristics qualify the proposed group as a protectable group under asylum law.[268] The questions for the near future are: will the Third Circuit take up the issue with a post-*Valdiviezo-Galdamez* analysis, and how will the Seventh Circuit rule on the matter when given the opportunity?

4. The Tenth Circuit Finds Only "Particularity"

In *Rivera-Barrientos v. Holder*, the Tenth Circuit became the first circuit court to hold that a group made up of individuals who resist gang recruitment satisfies the BIA's "particularity" requirement.[269] *Rivera-Barrientos* concerned Carmen, a Salvadoran native, who was approached by MS-13 gang members in her neighborhood in an attempt to recruit her.[270] Carmen refused to join them because she did not approve of the gang's activities, to which the gang members responded by threatening her family.[271] The gang continued to harass Carmen and pressure her to join the gang, but she stayed true to her convictions.[272] One day, on her walk to the bus station, Carmen encountered five gang members who began to demand, yet again, that she join their gang.[273] Upon refusing, a gang member put a knife to Carmen's throat, forced her into a car, and blindfolded her.[274] After driving to a field, the gang members dragged Carmen out of the car and asked if she had changed her mind.[275] When she answered in the negative, the gang members began kissing her, and when she tried to escape, one of them struck her in the face with a bottle.[276] Three of the gang members then proceeded to rape her.[277] When they finished,

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266. *Cece*, 733 F.3d at 677.
267. *Id.* at 666.
268. *Id.* at 673.
269. 666 F.3d 641, 650 (10th Cir. 2012).
270. *Id.* at 644.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*

the gang member threatened to kill her and her mother if she told the police, and Carmen complied for fear of retaliation and because she did not believe the police would help.[278] After the incident, Carmen did not leave her house for several days, but the gang began showing up at her house to continue their pursuit of recruiting her.[279] With her mother continuously lying to the gang about her whereabouts, Carmen fled El Salvador for the United States, where immigration officials apprehended her.[280]

In removal proceedings, Carmen applied for asylum and argued that she was a refugee because she belonged to a particular social group.[281] The immigration judge held that Carmen had failed to establish persecution on account of her group,[282] "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment."[283] On appeal, the BIA denied her claim for asylum, finding that young women who refuse to join gangs do not make up a group that is sufficiently particular or socially distinct.[284] Carmen then took her claim to the Tenth Circuit to determine if her group could in fact constitute a cognizable social group.

The Tenth Circuit analyzed Carmen's purported group through the BIA's "particularity" and "social distinction" requirements.[285] Despite affording the BIA *Chevron* deference on the issue, the court nevertheless held that "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" was in fact a particularly defined group.[286] The court conceded that the definition as a whole *may* be broad and with ambiguous terms, but its individual traits were not vague:[287] "a discrete class of young persons sharing the past experience of having resisted gang recruitment can be a particularly defined trait."[288] The court then asserted that characteristics such as age and gender are easily defined and are unlike terms such as being middle class or being part of a stable family.[289] The Tenth Circuit concluded its "particularity" analysis by explicitly disagreeing with

278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 644–45.
282. *Id.* at 645.
283. *Id.* at 647.
284. *Id.* at 648.
285. *Id.* at 648–54.
286. *Id.* at 650.
287. *Id.*
288. *Id.*
289. *Id.*

the BIA's determination that Carmen's social group was not particularly defined.[290]

The court, however, denied Carmen's claim because it determined that her proposed group lacked the requisite social distinction.[291] The Tenth Circuit found that MS-13 directs harm to any individual to promote its interest.[292] Therefore, the court stated, individuals who resist recruitment efforts are in no different of a situation than other members of the community who interfere with the gang's interests.[293] Thus, the court affirmed the BIA's determination that young women who resist gang recruitment efforts do not meet the "social distinction" requirement.[294] The Tenth Circuit, consequently, agrees with its sister courts in holding that these types of social groups are not "socially distinct," but clearly believes they satisfy the "particularity" requirement.[295]

5. Summary of Issues for Analysis

In sum, the BIA has added two new requirements, "particularity" and "social distinction," to its asylum analysis.[296] However, there has been significant disagreement between circuits as to the appropriate level of deference these new qualifications should receive.[297] While the majority of circuit courts have given the BIA *Chevron* deference in articulating the new conditions, the Ninth Circuit applied an alternative test, the Seventh Circuit explicitly rejected the social distinction requirement, and the Third Circuit refused to apply both.[298] In the context of children fleeing Central America because of gang-forced recruitment, the BIA has consistently held that such groups do not constitute a "particular social group" for asylum purposes.[299] The vast majority of circuits have agreed with the BIA by ruling explicitly on the matter and rejecting such asylum claims,[300] or

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290. *Id.*
291. *Id.* at 654.
292. *Id.*
293. *Id.*
294. *Id.* Importantly, the Tenth Circuit had the opportunity to take on the issue with regard to men but elected to avoid the issue by denying an asylum claim on different grounds. *See* Cisneros-Diaz v. Holder, 415 F. App'x 940, 943 (10th Cir. 2011).
295. *Rivera-Barrientos*, 666 F.3d at 650.
296. *See supra* Part II.A.3.
297. *See supra* Part II.A.4.
298. *See supra* Part II.A.4.
299. *See supra* Part II.B.1.
300. *See supra* Part II.B.2.

by simply granting *Chevron* deference to the BIA.[301] However, the Third and Seventh Circuits have yet to rule on the matter, and the Tenth Circuit held that young women who resist gang recruitment is sufficiently defined with particularity.[302]

III. THE BIA IS ENTITLED TO DEFERENCE AND CHILD VICTIMS OF GANG VIOLENCE ARE ENTITLED TO ASYLUM

The main issue with asylum law as it stands today with respect to membership in a particular social group is that the courts of appeals have not all agreed on the appropriate deference level or how it applies to children fleeing Central American gang activity. These disparate views, or lack thereof, should align so as to avoid contradictory results based on geography, given that asylum and immigration law is a national issue. The first step is to apply a uniform level of deference to the BIA's three-step test. The circuit courts should also take the opportunity to give their opinions on the issue of asylum applicants who are young and resist gang recruitment in their home country. In doing so, the courts of appeals should accept the social group definition, "males between the ages of 11-18 who refuse gang membership and resist gang-forced recruitment," as one that can be generally applied to the humanitarian crisis in Central America and passes the BIA three-step test.

A. The BIA Should Be Afforded *Chevron* Deference

The circuit courts apply varying levels of deference to the BIA's three-step test,[303] but this should not be the case. The Department of Justice has explicitly imposed an obligation on the BIA to provide clear and uniform guidance to the general public.[304] Ever since the BIA created its three-step test and took a stance on the issue of young male children resisting gangs, subsequent asylum jurisprudence has been anything but clear and uniform.[305] Circuit courts should grant the BIA *Chevron* deference to minimize confusion. When courts of

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301. *See supra* note 132 and accompanying text.

302. *See supra* Parts II.B.4–5.

303. *See* discussion *supra* Part II.A.4.

304. 8 C.F.R. § 1003.1(d)(1) (2014).

305. *See supra* Part II.A. Not only have circuits explicitly stated their confusion with the BIA's requirements and how they apply to the issue at hand, but they go so far as to reject the requirements or impose their own tests. *See* discussion *supra* Part II.A.

appeals refuse to give *Chevron* deference to an agency, there is a danger that it will further promote inconsistency.[306]

The division amongst courts of appeals as to the appropriate deference level that should be granted to the BIA in this situation can be resolved by analyzing the BIA's precedents and fundamental agency deference jurisprudence. This analysis first necessitates an inquiry into whether the BIA deserves deference under *United States v. Mead*.[307] Under *Mead*, an agency qualifies for *Chevron* deference when Congress has delegated authority to the agency to make rules carrying the force of law, and the agency promulgates rules in the exercise of that authority.[308] Congress delegated rulemaking authority to the Attorney General,[309] who subsequently empowered the BIA with the same authority.[310] Additionally, the BIA created its three-step test in the exercise of that authority via case-by-case adjudication.[311] Thus, the BIA may be entitled to *Chevron* deference in its interpretations of the INA and in its later addition of requirements.[312]

The issue of whether *Chevron* deference is, in fact, appropriate in light of the BIA's precedents highlights the split where some circuit courts abandon the BIA three-step test and others embrace it.[313] The BIA announced its first prong, the "common and immutable characteristic" requirement, in *In re Acosta*.[314] The Supreme Court determined the proper deference level for this first requirement, holding that the BIA was entitled to *Chevron* deference.[315] The BIA, however, faced criticism when it created two new qualifications for establishing a "particular social group."[316]

The "social distinction" requirement was challenged by two courts of appeals for its allegedly inconsistent use and nonsensical

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306. *See supra* Part II.

307. 533 U.S. 218 (2001).

308. *Id.* at 226–27.

309. 8 U.S.C. § 1103(a)(1) (2012); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

310. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). Indeed, no circuit court disagrees with this position.

311. *See* discussion *supra* Part II.A*; see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).

312. *See Mead*, 533 U.S. at 226–27.

313. *See supra* Part II.A.4.

314. *See supra* Part II.A.1.

315. *See supra* Part II.A.2.

316. *See supra* Part II.A.4.

application.[317] The theory that the BIA has applied the "social distinction" requirement inconsistently may have some merit. It is true that the BIA has held that certain groups constitute "particular social groups" without mentioning whether they were socially distinct.[318] This argument loses strength, however, when one recognizes that those cases were all decided before the BIA announced the "social distinction" requirement.[319] Consequently, this argument fails because it relies on a word search of the term "social distinction" rather than the BIA's use of the requirement in its analysis of asylum cases.[320]

The other argument for the BIA's inconsistency in applying the "social distinction" requirement alleges that the requirement adds another test to the legal analysis without explaining the reason for the new rule.[321] This argument stems from a misunderstanding of how the BIA scrutinizes asylum claims. The BIA's "social distinction" prong was always a part of its analysis, albeit not formally named.[322] Assuming that the anti-"social distinction" position is correct, the BIA may nevertheless be entitled to *Chevron* deference.[323] On numerous occasions, the BIA has extensively explained its reasoning behind social distinction.[324] Thus, even if it is an inconsistency, it cannot, by any measure, be an unexplained inconsistency.[325] Further, the BIA is not required to stick with its initial formulation,[326] if some day it decides to stop applying its three-part test. Importantly, the

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317. *See supra* Part II.A.4.

318. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

319. *See In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (explaining it previously used societal recognition in its analysis, and it was merely announcing it as a social distinction test).

320. *See id.*

321. *See* Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 604 (3d Cir. 2011).

322. *See, e.g.*, *In re* H-, 21 I. & N. Dec. 337, 342–43 (B.I.A. 1996) (applying a "distinction" and "recognition" analysis to the groups previously asserted).

323. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

324. *See, e.g.*, *In re* W-G-R-, 26 I. & N. Dec. 208, 213–21 (B.I.A. 2014); *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237–49 (B.I.A. 2014); *In re* S-E-G-, 24 I. & N. Dec. 579, 582–588 (B.I.A. 2008).

325. *See Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

326. *See id.*

same analysis can be applied to the arguments alleging the "particularity" requirement was inconsistently used.

Next, opposing circuit courts attempt to argue that the use of the "social distinction" requirement is unreasonable, and, therefore, not entitled to *Chevron* deference.[327] The thrust of this argument lies in the view that to require social distinction would put individuals fleeing persecution in harm's way,[328] and in the theory that some characteristics are inherently invisible and, in fact, are purposely concealed.[329] The latter rationale misunderstands what the BIA attempts to make clear. Social distinction does not require "ocular" visibility.[330] Social distinction merely requires that the members of the community be able to distinguish the group from the rest of society, or, simply put, recognize the group's existence.[331] The former rationale also fails because it, too, misinterprets the "social distinction" requirement. An individual need not state his or her characteristic to the public at large. So long as the public can perceive or recognize a group, society need not identify an individual member of that group.[332] Therefore, the BIA should be entitled to *Chevron* deference by all circuit courts[333] for its two new qualifications, which would allow for greater uniformity.

B. The Third and Seventh Circuits Should Grant Asylum

As discussed in Part II, the Third and Seventh Circuits have either avoided the issue of children fleeing Central America because of gang violence or have not had the opportunity to rule on the matter.[334] These Circuits should take the next opportunity to definitively rule on the matter to either promote uniformity among the circuit courts or to force the Supreme Court of the United States to rule by highlighting a split. However, in considering whether young individuals who resist

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327. *See* Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 607 (3d Cir. 2011).

328. *Id.*

329. *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009). This approach argues, for example, that homosexual individuals would not be recognized or distinguished from heterosexual individuals. *Id.*

330. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 240 (B.I.A. 2014) (emphasizing the importance of "perception" or "recognition").

331. *Id.* (renaming social visibility to social distinction to emphasize that the term social visibility was never literally interpreted).

332. *Id.* The BIA explained that members of a community may not be able to identify individual homosexuals, but society could still perceive homosexuals as a particular social group because of sociopolitical or cultural conditions. *Id.*

333. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

334. *See* discussion *supra* Part II.B.3.

gang recruitment constitutes a "particular social group" under the INA, these courts should review the issue de novo because the BIA has already evaluated the issue.[335] While giving deference to the BIA for its three-step test, the circuit courts would be able to review the issue of Central American children seeking asylum anew.[336] Moreover, the Third and Seventh Circuits may disagree with their sister courts and recognize that young males or females[337] who refuse to join gangs, despite being subjected to forced recruitment, constitutes a particular social group that passes the BIA's three-step test.[338]

The specific definition that courts should accept when evaluating asylum claims from children fleeing gang violence in Central America is "males between the ages of 11-18 who refuse gang membership and resist gang-forced recruitment."[339] This definition would allow the courts of appeals that accord *Chevron* deference to the BIA to find a cognizable group while working within the three-prong test. Each characteristic of the proposed group meets the three requirements: a common, immutable characteristic, "particularity," and "social distinction."[340]

1. Gender, Age, and Resistance to Recruitment Are Common, Immutable Characteristics

Gender is undoubtedly an immutable characteristic that is common among the members of the proposed group. If the entire group is composed of men, or male children, they must necessarily share the trait of maleness. Furthermore, any individual in the proposed group is unlikely to unilaterally be able to change the fact that he is male.[341] Moreover, the BIA and courts of appeals have accepted gender as an

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335. *See supra* note 132 and accompanying text.

336. *See supra* note 132 and accompanying text.

337. A similar analysis may apply to either gender. Though, as mentioned *supra* note 31, female children raise another issue not covered by this topic because of its complexity, namely sexual violence.

338. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 232 (B.I.A. 2014).

339. The logic behind the age range is derived from the fact that gangs are known to prey on younger individuals. *See* UNHCR, *supra* note 34, at 4. Recall that this Note speaks in terms of male children because of the complex legal issues that female children must navigate when subjected to sexual violence, but it is possible that a similar analysis may apply to females. *See supra* note 31.

340. *See In re* M-E-V-G-, 26 I. & N. Dec. at 237.

341. *See In re* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (holding that the characteristic of being a young woman cannot be changed).

immutable characteristic.[342] Indeed, even the United Nations High Commissioner for Refugees stated that gender is "an innate and immutable characteristic."[343] Further, the Seventh Circuit has already accepted gender as an unchangeable characteristic[344] and need only apply it to the proposed definition.

Age is also an immutable characteristic that would be common among the group's members. Undeniably, an individual cannot change his or her age and every member of the group, who must therefore be within the age range, shares a common trait.[345] An asylum applicant would not be able to make him or herself fit into the group. To do so would require an individual to make him or herself younger or older at will. Moreover, the Seventh Circuit has conceded that age qualifies as a common, immutable characteristic.[346]

Refusing to join a gang and resisting subsequent forced recruitment can be an immutable and common characteristic if categorized as a shared past experience amongst the group.[347] This is particularly true because the past experience of declining a membership offer and resisting the inevitable forced recruitment would not change, given the fact that it has already occurred.[348] Taking active steps in opposition to a gang would be a common characteristic among the members of the group.[349] The Seventh Circuit has held that a characteristic may be immutable because it has imparted a label that

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342. *See In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."). Circuit courts have also acknowledged such a finding. *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005); Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005).

343. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 8 (2002), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Gender.pdf.

344. *See* Cece v. Holder, 733 F.3d 662, 672 (7th Cir. 2013).

345. *Id.* at 673 (stating that age is not alterable).

346. *Id.*

347. *See In re Acosta*, 19 I. & N. Dec. at 233. In *In re S-E-G-*, the BIA found that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes." 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

348. *See In re Acosta*, 19 I. & N. Dec. at 233. It is fundamental to their conscience because these teenagers are making the conscientious effort to refuse joining a criminal organization. They are keeping to their morals and values by taking the more difficult road.

349. *See* Pirir-Boc v. Holder, 750 F.3d 1077, 1082 n.3 (9th Cir. 2014).

cannot be undone,[350] and that is exactly what is done when an individual refuses to join a gang. The children that resist a gang's recruitment efforts are constantly hunted, and they are often unsafe even in their own homes.[351] As the Tenth Circuit explained in *Rivera-Barrientos*, after Carmen had a knife placed against her throat, was hit with a bottle in the face, and endured a gang rape, the gang members appeared at her home to continue their harsh recruitment tactics.[352] It seems clear that she was labeled as a person who refused to join their ranks and was targeted for that purpose.[353] The people who receive this label are all treated the same: with hostility.[354] The only way to undo this label would be to join the gang, which is the very thing they are refusing to do.[355] Therefore, this group definition satisfies the common, immutable characteristic requirement.

2. Gender, Age, and Refusal to Join a Gang Define the Group with Particularity

The "male" trait also satisfies the BIA's "particularity" requirement. The "particularity" requirement mandates the existence of a definitive benchmark to indicate who falls within the purported group.[356] There must be definable boundaries, and they cannot be subjective.[357] A gender characteristic, such as maleness, serves as a definitive benchmark because[358] it would be easy to recognize who falls into the group by virtue of their gender identity.[359] Information on which gender an individual considers him or herself can be quickly obtained by reading legitimate government documents that require a person to identify which gender he or she belongs to. For example, a New York citizen's gender can be known by looking

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350. *See* Cece v. Holder, 733 F.3d 662, 670 (7th Cir. 2013).

351. *See, e.g.*, Solomon-Membreno v. Holder, 578 F. App'x 300, 302 (4th Cir. 2014) (the house was set on fire); Mendez-Barrera v. Holder, 602 F.3d 21, 24 (1st Cir. 2010) (gang members threw rocks at the house).

352. *See* Part II.B.4.

353. *See* Rivera-Barrientos v. Holder, 666 F.3d 641, 646 (10th Cir. 2012) (quoting the BIA's determination that the gang members attempted to force her to join the gang and she was attacked due to her refusal).

354. *See* UNHCR, *supra* note 34.

355. *See Cece*, 733 F.3d at 669. In *Cece*, the Seventh Circuit held that a woman should not be required to find a man to protect her. *Id.* The choice to be single was found to be the type of fundamental characteristic that courts do not ask asylum applicants to change. *See Id.*

356. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

357. *Id.*

358. *See In re* A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

359. *See generally* Rivera-Barrientos v. Holder, 666 F.3d 641, 650 (10th Cir. 2012).

at his or her driver's license or non-driver identification card, which requires the owner of the license or card to mark which gender he or she belongs to when filling out the application.[360] Therefore, the Third and Seventh Circuits should adopt the portion of *Rivera-Barrientos* that acknowledges gender as a characteristic that is susceptible to easy definition, and thus, particularly defined.[361]

Likewise, the age range feature of the proposed definition should also meet the "particularity" hurdle.[362] Proving that an individual is within the requisite age range would simply require a showing of a birth certificate.[363] If the asylum-seeker is below or above the age range, then he or she will not be a member of the group. Age, like gender, is susceptible to easy definition and therefore satisfies the "particularity" requirement.[364]

The last characteristic of the proposed definition, refusing to join a gang and resisting forced recruitment, is also particularly defined. A showing of "particularity" in this instance would require a showing that, at some point, the asylum-seeker was asked to join the gang, but he refused. Additionally, an asylum applicant would have to show that the gang used forced recruitment as a tactic to coerce compliance, but he stayed true to his conviction.[365] Notably, the proposed definition replaces "resistance to gang recruitment," with "refusal to join a gang and resist forced recruitment." This is because of the subjectivity of the former phrasing. Resistance to gang recruitment was not widely accepted because it is very subjective.[366] The largest criticism of resistance to gang recruitment received from courts is the problem in determining when an individual has resisted enough to become a member of the group.[367] Moreover, it leaves open the question of what exactly constitutes resistance to gang recruitment.[368]

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360. N.Y. STATE DEP'T OF MOTOR VEHICLES, APPLICATION FOR DIVER LICENSE OR NON-DRIVER ID CARD, *available at* http://dmv.ny.gov/forms/mv44.pdf.

361. *See Rivera-Barrientos*, 666 F.3d at 650.

362. *See In re* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) ("young women").

363. Admittedly, a child under the age of eighteen in a foreign country may have difficulty gaining access to a birth certificate from their home country.

364. *See Rivera-Barrientos*, 666 F.3d at 650.

365. *See supra* Part II.B.4.

366. *See supra* Part II.B.2.

367. *See supra* Part II.B.2; *see also* Mendez-Barrera v. Holder, 602 F.3d 21, 27 (1st Cir. 2010) (explaining its concern of knowing the requisite degree to which an individual must resist such recruitment).

368. *See supra* Part II.B.2.

"Refusal to join a gang and resisting forced recruitment," however, overcomes the criticism that the characteristic "resistance to gang recruitment" faced. Imposing a refusal characteristic requires an individual to demonstrate that he was approached for the purpose of recruitment and that he made known his opposition to gang activity. This is a very objective standard because there is undoubtedly no interpretive question about the word "no." Resisting forced recruitment is also an objective term because it narrows the type of persecution that is suffered. Resistance plainly means "the inherent ability of an organism to resist harmful influences."[369] Thus, the asylum-seeker would have to continue refusing to join a gang despite the use of forced recruitment.[370] Like the rest of the group, forced recruitment is not an amorphous term. As explained above in Part I, gangs will carry out their threats of physical harm, rape, and death to both the asylum applicants and their family members. Therefore, refusal to join a gang and resisting forced recruitment is particularly defined because an immigration judge could easily identify if an asylum-applicant answered the gangs in the negative and whether the asylum-applicant has persisted in his or her refusal despite being subjected to forced recruitment.

3. Gender, Age, and Refusal to Join a Gang Socially Distinguish Members of the Group

Finally, "males between the ages of 11–18 who refuse gang membership and resist gang-forced recruitment" should be considered socially distinct within their society. In 2003, the Salvadoran, Honduran, and Guatemalan legislatures enacted anti-gang laws in response to popular demand to deal with the crippling effect the gangs were having on the community.[371] These laws were used to incarcerate large numbers of youth who had tattoos.[372] The Honduran government passed legislation making gang membership illegal.[373] Furthermore, there are credible reports from the Congressional Research Service[374] of civilian vigilante killings of gang

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369. MIRIAM-WEBSTER'S DICTIONARY AND THESAURUS 708 (2014)

370. *See* Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (continuing her refusal to join the gang despite being threatened with a knife at her throat).

371. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 9 (2014), *available at* https://www.fas.org/sgp/crs/row/RL34112.pdf.

372. *Id.*

373. *Id.*

374. The Congressional Research Service is a legislative branch agency that provides policy and legal analysis to committees and both members of the House and

members.[375] This demonstrates how society, both the countries' citizens and their elected officials, distinguish between youth gang members and youth non-members. The fact that law enforcement specifically targeted youth gang members shows that Central American society distinguishes between those who have been recruited and those who have not.

In addition, though the persecutor's perception of the purported social group is not determinative, it is probative into the inquiry of social distinction.[376] Gang members recognize adolescent children as a group and target them specifically for recruitment.[377] As demonstrated *supra* in Part II, upon refusal, the same children are then persecuted for continuing to resist the forced recruitment. It seems logical that if the recruited children joined the gang, they would no longer be persecuted for the purpose of recruitment.

Further proof of societal recognition is the recent influx of unaccompanied minors.[378] The very fact that unaccompanied minors are pouring into the United States is evidence that mothers and fathers recognize that these children are being subject to extraordinary levels of gang violence.[379] The attempt to send their children out of the country alone demonstrates that society distinguishes the children from society as a whole with regard to the susceptibility to gang-forced recruitment. Moreover, as the BIA has stated, the Salvadoran, Honduran, and Guatemalan community does not have to identify which child is a specific gender, age, and has

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Senate. *Congressional Research Service Careers,* LIBR. CONGRESS, http://www.loc.gov/crsinfo/ (last visited May 15, 2015).

375. *See* SEELKE, *supra* note 371.

376. *See In re* W-G-R-, 26 I. & N. Dec. 208, 218 (B.I.A. 2014) ("The perception of the applicant's persecutors may be relevant because it can be indicative of whether society views the group as distinct. But the persecutors' perception is not itself enough to make a group socially distinct.").

377. *See* UNHCR, *supra* note 34, at 4.

378. *See* Robles, *supra* note 50. President Barack Obama has named this exodus of children from Honduras, Guatemala, and El Salvador an "urgent humanitarian situation." Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Number of Latino Children Caught Trying to Enter U.S. Nearly Doubles in Less than a Year*, PEW RES. CENTER (June 10, 2014), http://www.pewresearch.org/fact-tank/2014/06/10/number-of-latino-children-caught-trying-to-enter-u-s-nearly-doubles-in-less-than-a-year/. From 2009 to 2014, there has been over a 700% increase in apprehensions of unaccompanied minors traveling into the United States from El Salvador. *Id.* The numbers for Guatemalan unaccompanied minor children have increased by over 900%. *Id.* Honduras has seen a far more shocking increase as the numbers have grown from 968 in 2009 to 13,282 in 2014, a 1272% increase. *Id.*

379. *See* Robles, *supra* note 50 ("The first thing we can think of is to send our children to the United States.").

refused gang recruitment and subsequently resisted forced recruitment.[380] Society need only recognize that such a group exists.[381] Society, therefore, does distinguish "males between the ages of 11–18 who refuse gang membership and resist gang-forced recruitment." Thus, the Third and Seventh Circuit, in applying *Chevron* deference to the BIA's three-pronged test, should recognize "males between the ages of 11–18 who refuse gang membership and resist gang-forced recruitment" as a particular social group for asylum purposes.

CONCLUSION

Despite the BIA's consistent use of a three-step test, circuit courts have not unanimously accepted it.[382] The Supreme Court's failure to weigh in on the issue of gang related asylum applications has left the circuit court jurisprudence in disarray.[383] In their confusion, courts of appeals have either rejected the entire test, opposed part of the test, or put forth their own alternative.[384] By giving the BIA proper deference and applying the purported definition for male children, circuit courts will, in time, create a path to uniformity in asylum law. In doing so, courts should review the BIA's decision de novo, and decide for themselves whether children fleeing Central America because of widespread and uncontrollable gang violence are entitled to asylum.

Hopefully, the Third and Seventh Circuits will soon get the chance to finally add their opinion into this complex national issue. When the opportunity arises, the Third and Seventh Circuits should recognize the valid claims that many of these children bring into immigration court. The horrific conditions in inner cities in Central America is the type of issue that refugees were meant to be protected from under the INA. Children who are targeted because of their gender and age should be protected from gang-forced recruitment when they leave their home country because death or injury is almost inevitable. In using the BIA's three-part test, the Third and Seventh Circuits will be able to resolve the current issue of children from Central America seeking asylum en masse.

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380. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 240 (B.I.A. 2014) ("Society can consider persons to comprise a group without being able to identify the group's members on sight.").

381. *Id.*

382. *See* discussion *supra* Part II.A.

383. *See* discussion *supra* Part II.B.

384. See discussion *supra* Part II.A.